STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1157

Michael Afremov,
Plaintiff,

vs.

Kurt Amplatz, et al.,
Defendants,

AGA Medical Corporation,
Appellant,

and

Computer Forensic Services, Inc., interested observer,
Respondent.

Filed May 25, 2010
Affirmed in part, reversed in part, and remanded.
Ross, Judge

Hennepin County District Court
File No. CT 02-017734

Lewis A. Remele, Jr., Dale M. Wagner, Mark R. Bradford, Bassford Remele, P.A., Minneapolis, Minnesota (for appellant)

John F. Bonner, Robert J. Borhart, Bonner & Borhart, LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

This appeal concerns Computer Forensic Services, Inc.'s efforts to be compensated for storing and analyzing AGA Medical Corporation's computer data. Computer Forensics Services (CFS) acquired AGA's data as directed by a court-appointed receiver during shareholder litigation. The suit settled, but CFS was not immediately notified and continued to store and preserve the data. CFS later analyzed the data at the request of a county attorney who was prosecuting an AGA employee. CFS moved the district court for an order directing AGA to pay CFS its fee, and the district court granted the motion. AGA appeals.

Because we agree with the district court that AGA has unjustly retained a benefit from CFS's services, we affirm in part. But because the district court exceeded its discretion by awarding storage fees before AGA was informed that fees would be charged, and because the district court clearly erred in determining the reasonable value of CFS's monthly storage, we reverse in part and remand for the district court to recalculate CFS's total award in accordance with this opinion.

FACTS

In 2002, shareholder Michael Afremov sued AGA Medical Corporation and others, alleging wrongful refusal to provide access to corporate records, breach of fiduciary duties, and breach of contract. The district court appointed a receiver for AGA. The receiver retained Mark Lanterman and later Lanterman's firm, Computer Forensic Services, to store and analyze large volumes of data from certain AGA computers. The

receiver directed CFS to acquire AGA's e-mail servers and other computers, to perform diagnostic tests, to investigate AGA electronic data, and to preserve and retain custody of the litigation data. The receiver also directed CFS to cooperate with federal and state officials investigating AGA personnel. The district court approved various fees for CFS's services, which were paid in full.

The court discharged the receiver in October 2005 after the corporate litigation settled. But CFS did not immediately learn of the settlement. At considerable expense, CFS continued to follow its prior directives, storing and maintaining the AGA litigation data and responding to requests for information by government investigators. From January to April 2006, CFS analyzed the AGA litigation data at the request of the Hennepin County Attorney, who was prosecuting AGA employee William Liebesny and his accomplice Brent Peterson, who had allegedly embezzled from the corporation. The case resulted in the pair's conviction and an order to pay AGA $3 million. The prosecutor deemed CFS's assistance essential to the prosecution.

During the first quarter of 2006, CFS learned that AGA's receiver had been discharged. The receiver's attorney advised CFS that it should contact AGA directly regarding payment. From earlier instructions, CFS anticipated that AGA would compensate it for facilitating Liebesny and Peterson's prosecution. CFS contacted AGA for payment. AGA initially refused to pay for any of CFS's work responding to the Hennepin County Attorney's requests. After Lanterman informed AGA that he could not continue trial preparation without payment from AGA, however, AGA paid a $4,600 invoice for Lanterman's expert testimony and trial preparation.

For the next year and a half, CFS continued unsuccessfully to seek payment for storage and maintenance costs from AGA while also unsuccessfully requesting direction from AGA about the retention or destruction of the data. In May 2006, CFS informed AGA that fees might accrue for storing data that had been copied onto AGA's servers during the receivership. In a letter to AGA dated May 9, CFS wrote,

> Currently, the imaged data is being stored on our secure servers. If there is anything else we can do for you regarding this matter, please let us know. Furthermore, if no additional work is needed in this matter or if it has settled, please contact us at your earliest convenience to discuss the disposition of your stored data and work product.
>
> At the conclusion of a case, we provide our clients with a variety of options regarding their data. Most clients ask us to securely clear their data from our servers once their case has settled or been adjudicated. There is no charge for this service. If you have special needs for your data, we can work with you to accommodate them. We can also store your data on our servers for a monthly fee if needed. Other options are available upon request.

In a second letter dated May 18, CFS informed AGA's counsel that its standard data-storage rate would result in a monthly charge of $7,400 for AGA's litigation data. CFS also indicated that it "would be willing to discuss with [AGA] a variation from this standard charge if [AGA was] interested in maintaining the data on [CFS's] servers" and inquired how AGA wished to proceed.

AGA responded to CFS's letters by requesting an inventory of the data that CFS possessed. CFS replied by requesting compensation before preparing the inventory because of AGA's prior refusal to pay. AGA refused to pay for any of CFS's efforts to prepare an inventory. In June, CFS's counsel contacted AGA and explained that CFS

could not comply with AGA's inventory request without expending significant time and effort. CFS's counsel suggested that a motion in district court might be a prudent way to determine what to do with the data. But CFS received no response or instructions from AGA, and neither party acted on CFS's suggestion to involve the district court. In December 2006, CFS sent AGA a list of AGA's data in its possession in an effort to resolve the storage issue. AGA's only response was to instruct CFS not to destroy any AGA data. In January 2007, CFS again sent AGA a list of stored data and hardware, and again AGA provided no disposal directions. CFS continued to store the data, and AGA continued to ignore CFS's request for payment for this storage.

From April to July 2007, CFS analyzed the litigation data on behalf of former AGA shareholder Michael Afremov, who was being prosecuted federally for fraud. AGA gave CFS permission to analyze AGA's data for Afremov at Afremov's expense. In June, CFS billed Afremov $674,861 for its work, and it ceased work in July because Afremov had not paid. In August, a United States magistrate judge issued a report recommending that Afremov pay CFS $628,737 for its work done on his behalf.

CFS moved the state district court in September 2007 to order AGA to pay CFS's outstanding fees. The parties suspended action on the motion while the federal court resolved the Afremov−CFS fee dispute. The state district court conducted an evidentiary hearing on CFS's motion in March 2009. On May 1, the district court ordered AGA to pay the outstanding balance on CFS's work in the Liebesny−Peterson case as well as storage fees commencing from the receiver's discharge in October 2005. Because it found that the parties did not have an oral or written contract after the receiver's

discharge, the court analyzed the case under a quasi-contract theory. The court determined that AGA had received a benefit both from CFS's litigation services and from its storage and maintenance of the data. It concluded that AGA would be unjustly enriched if CFS were not paid a reasonable fee for its efforts. The court found that CFS had provided services in the Liebesny−Peterson prosecution reasonably worth $42,670. After subtracting the $4,600 that AGA had already paid Lanterman, the court awarded CFS $38,270 as the balance due for that work.

The district court found that CFS's quoted rate of $7,400 per month was the reasonable price of storing AGA's data. The court also found that CFS had stored and maintained the AGA data for 43 months, from October 2005 through the date of the order. Because CFS suspends storage-fee accrual while it analyzes data, the court subtracted the four-month period during which CFS was analyzing the data for the Liebesny−Peterson prosecution and the four-month period during which it was doing so for the Afremov defense. The district court computed a total storage-fee award of $259,000 for a net storage period of 35 months. It ordered CFS to return without charge specific data that AGA wanted and to destroy all other AGA data not subject to any court order.

AGA appeals.

D E C I S I O N

AGA challenges the district court's award of quasi-contract damages to CFS. To establish a quasi-contract claim, the plaintiff must show (1) that the plaintiff conferred a benefit on the defendant, (2) that the defendant appreciated the benefit, and (3) that the

defendant accepted and retained the benefit under circumstances that would make it inequitable for the defendant to retain the benefit without paying for it. *Acton Const. Co. v. State*, 383 N.W.2d 416, 417 (Minn. App. 1986), *review denied* (Minn. May 22, 1986). The third element of a quasi-contract claim requires a showing of unjust enrichment. *See Marking v. Marking*, 366 N.W.2d 386, 387 (Minn. App. 1985) ("No recovery can be had in quasi contract against one not shown to have been wrongfully enriched at the plaintiff's expense.")

AGA argues that for a defendant to be unjustly enriched by services performed by the plaintiff, the defendant must have impliedly promised to pay for those services. We do not find this requirement in the caselaw. A party is unjustly enriched when he knowingly receives something of value to which he is not entitled under circumstances that make it unjust for him to retain the benefit. *ServiceMaster of St. Cloud v. GAB Business Services, Inc.*, 544 N.W.2d 302, 306 (Minn. 1996). Unjust enrichment may occur when it would simply be "morally wrong for one party to enrich himself at the expense of another." *Anderson v. DeLisle*, 352 N.W.2d 794, 796 (Minn. App. 1984), *review denied* (Minn. Nov. 8, 1984). We decline to adopt the rigid implied-promise requirement that AGA advocates. If the circumstances here make it unjust for AGA to retain the benefit of CFS's data-preservation services, then it is immaterial whether AGA impliedly promised to pay or not. We turn first to AGA's challenge to the storage-fee award and then to the data-analysis-fee award.

I

AGA first challenges the district court's $259,000 storage-fee award to CFS. The right to recover damages in quasi-contract is governed by equitable principles. *Acton*, 383 N.W.2d at 417. "Granting equitable relief is within the sound discretion of the trial court. Only a clear abuse of that discretion will result in reversal." *Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979). The district court concluded that AGA received a benefit from CFS's maintenance and preservation of AGA's data, that AGA realized that benefit by receiving a $3 million judgment in restitution and by having its data maintained in an uncorrupted state, and that AGA would be unjustly enriched if it should retain its benefits without paying CFS.

We agree with the district court that AGA was unjustly enriched. But we conclude that the court awarded too much in damages for the enrichment. First, the district court exceeded its discretion by granting storage fees for October through December 2005 because this period preceded CFS's first notice to AGA that it would assess a fee for storage. And second, the district court clearly erred by finding that $7,400 per month was the reasonable value of storage because CFS did not provide sufficient proof that this amount reflected the market value of its service. We therefore affirm in part, reverse in part, and remand with instructions to the district court to recalculate the damages award.

AGA's first argument against the district court's quasi-contract award is that CFS was a constructive bailee of the data and, as such, was not entitled to charge storage fees. A constructive bailment is "[a] bailment that arises when the law imposes an obligation

on a possessor of personal property to return the property to its rightful owner." *Black's Law Dictionary* 162 (9th ed. 2009). AGA argues that, as a constructive bailee, CFS could not claim storage fees until after it notified AGA that storage fees would accrue and that, after it notified AGA of potential storage fees in May 2006, CFS converted the bailed property by imposing conditions on its return.

The parties spend significant effort arguing about whether the data-storage arrangement here qualified as a constructive bailment. But we do not find it necessary to resolve the question of whether a constructive bailment arose in these circumstances. We agree with AGA that CFS was not entitled to storage fees before May 2006, but we reach this conclusion simply because it would be unjust for AGA to be assessed storage fees for the period before CFS explained that it would require a fee to store the data. And we reject AGA's conversion argument without deciding whether a bailment existed. Whether or not a bailment existed, AGA's argument fails because AGA never made an unqualified demand for the data to be returned. Even if it had, CFS's conditions for return were not inconsistent with AGA's ownership interest in the imaged data, and no conversion would have occurred.

We agree with AGA that it may justly retain without obligation the benefit of CFS's data-storage before May 2006. Until then, AGA did not know that storage would burden CFS or that CFS expected AGA to pay for the storage. The district court found that AGA compensated CFS for various services it performed during the receivership, but the court's order does not specify whether the compensated services included storage. A review of the record reveals that CFS did not charge for storage during the receivership.

The receiver's attorney testified that he could not recall any CFS invoices for storage, and AGA's former attorney testified that CFS did not charge for storage during the receivership. CFS's May 18, 2006, letter was the first indication to AGA that substantial fees would result for storing its data. We therefore conclude that the district court went a bit too far by awarding CFS storage fees from October 1, 2005 to December 31, 2005, and we direct the district court to recalculate CFS's award accordingly.

AGA argues that, even after CFS's May 2006 letters put AGA on notice that fees might be charged, "the constructive bailment relationship between AGA and CFS never transformed into one in which CFS could rightly claim storage fees." Instead, "by imposing conditions on the return of AGA's data, CFS converted AGA's property." Assuming a bailment existed, AGA's conversion argument fails for two reasons. First, AGA never demanded that CFS return the data. A conversion arises upon "a bailee's refusal to deliver goods to the rightful owner *upon demand*." *Hildegarde, Inc. v. Wright*, 244 Minn. 410, 413, 70 N.W.2d 257, 260 (1955) (emphasis added). The district court did not find that AGA ever demanded that CFS deliver any of the data to it. The court instead found that, "[t]hrough a clear lack of proper communication, the parties failed to reach an understanding as to what amount and what type of data CFS was storing at the time." The evidence would not have supported a finding that AGA demanded its data be returned.

At oral argument, AGA asserted that the company made an unqualified demand for the data in August 2007, explaining that, in an August 3 letter to CFS, AGA essentially stated, "Give us our property back." The record does not support this claim.

AGA's counsel indicated that the August 3 letter was included in the record as an exhibit. The representation has merit; the transcript shows that the exhibit was accepted into evidence by the district court at the March 2009 hearing. But this court has scoured the 11-box court file and is unable to find the exhibit. And because the district court accepted the exhibit into evidence without requiring foundation, the only record evidence of its contents is the attorneys' references to the exhibit during closing arguments. These references are not sufficient to support a finding that AGA unqualifiedly demanded that CFS turn over the data.

AGA's lawyer's quotations from the letter indicate that the letter does not itself request the data but insinuates that an earlier demand had been made: "Second, how can your client seek monthly storage fees of $7,400 when we've asked him to turn over the information to us and we'll store it. . . . If it cannot be retrieved and delivered to us, why is it worth $7,400 a month to store it?" Counsel asserted that this language established that in 2007 AGA was telling CFS that it wanted its data back and that CFS was refusing to relinquish it. But CFS's counsel responded that the letter's insinuation that AGA had demanded the data back was false. According to CFS's counsel and the district court's later finding, CFS had offered to destroy or store the data, and AGA had responded by asking for a list of the data but refusing to pay CFS for the effort of compiling it. It appears that the district court interpreted the August 3 letter as AGA's revisionary attempt to create a fact by embedding it in a rhetorical question. AGA has failed to convince us that the district court's findings should be altered on appeal.

AGA's conversion argument fails for a second reason. Even if AGA had demanded that CFS turn over the stored data, CFS's conditions were consistent with AGA's ownership interest in the data. A conversion requires "an exercise of dominion over the goods which is inconsistent with and in repudiation of the owner's right to the goods." *Hildegarde*, 244 Minn. at 413, 70 N.W.2d at 259. "It follows that if a bailee's refusal to deliver goods to the rightful owner upon demand does not involve a challenge to the owner's right to those goods, the bailee is not guilty of a conversion." *Id.*, 70 N.W.2d at 260. "[W]here the refusal is qualified, and such qualification upon delivery has a reasonable purpose, the bailee is not a converter since he has not asserted a dominion over the goods which is inconsistent with the owner's right to possession." *Id.* One such reasonable condition is that the owner first prove his title or right to possess the bailed property. *Id.*

AGA argues that CFS converted the data by requiring AGA to obtain a court order and to pay an additional $150,000 to decrypt the data before CFS would turn it over. Under the unique circumstances of this case, neither condition is unreasonable or inconsistent with AGA's ownership interest in the data. The court-order condition was appropriate because it was not clear who owned the data. *See id.* The stored data was not AGA's original property but had been copied, or "imaged," onto CFS's servers from AGA's computers at the receiver's behest. Lanterman believed that the imaged data belonged not to AGA but to AGA's receiver. Regardless of who owned the data, CFS was justifiably concerned that improperly disposing of the data could get it in trouble down the road, and a court order would immunize CFS against a claim that it mishandled

the data. The condition had a reasonable purpose and was not inconsistent with AGA's interest in the data.

The condition that AGA pay to have the data decrypted was also reasonable. This requirement was a byproduct of the security measures that CFS used to protect sensitive client information. Lanterman testified that all of the data on CFS's servers is encrypted to prevent unauthorized access to client information. CFS's security system allows only Lanterman and a designated employee to possess the "key" that can unlock a client's data. It follows that CFS must decrypt the data before it can be transferred to a client in an intelligible form. AGA offered no proof that the encryption practice, or the fees associated with decryption, were unreasonable. AGA's original data also still exists in unencrypted form on computers and other storage devices that were given to CFS during the receivership, and CFS has never denied AGA access to those computers and devices.

AGA argues alternatively that the district court should not have awarded CFS quasi-contract damages for storage after May 2006 because when CFS proposed a fee for storage, AGA immediately rejected the proposal. At the evidentiary hearing, a former CFS employee testified that, after receiving the May 2006 letters, AGA's attorney "specifically stated that they weren't going to be paying us for maintaining or storing this data." AGA instead requested an inventory of the data. CFS demanded payment for compiling the inventory, but AGA refused to pay even for that service, and the parties failed to reach an understanding about what the next step would be. We deem AGA's refusal to pay for storage irrelevant to the unjust-enrichment calculus in light of its simultaneous failure to disclaim any right to the data and its withholding of permission

for CFS to dispose of it. Knowing that CFS needed direction from AGA and wished to be free of the burden and cost of maintaining the data, it was incumbent upon AGA to do one of four things: (1) disclaim its interest in the data, (2) authorize CFS to delete it, (3) make an unqualified demand for some or all of the data, or (4) pay CFS to further identify the data. AGA did none of these.

AGA argues that CFS rendered it impossible for AGA to give disposal directions by requiring payment for an inventory and then claiming that it could not return the data without decrypting it for a fee. The argument does not change our opinion that AGA was unjustly enriched. It is clear that the amount of data was massive and that compiling an inventory would have required CFS resources. And although CFS did indicate that the data would have to be decrypted at a cost before it could be returned, AGA offered no proof that the asserted fee was unreasonable. CFS never denied AGA the data; it merely requested that AGA compensate it for additional work. If AGA wanted to avoid responsibility for paying storage fees, it should have allowed CFS to delete the data, paid CFS to create an inventory, paid CFS to decrypt the data, or requested the data in encrypted form. Instead, AGA withheld any initial direction as to how CFS should dispose of the data and later even expressly directed CFS not to delete it.

AGA argues that CFS should not have been awarded any storage fees after April 17, 2007, because at that time the data was under subpoena in the Afremov prosecution, and CFS had a legal obligation to maintain AGA's data. CFS was also expecting to be paid by Afremov for its work in his defense and was eventually awarded over $628,000 in federal district court. But the state district court did not require AGA to pay for

storage during the period that CFS analyzed the data for the Afremov trial. And the fact that the data was under subpoena from April 2007 to August 2008 does not alter the unjust-enrichment calculus. If AGA had allowed CFS to delete the data, CFS would not have been storing the data on AGA's behalf during that time, and presumably AGA rather than CFS would have been required to maintain the data under subpoena. It would be unjust to allow AGA to reap the benefit of having CFS store the data and respond to the subpoenas without paying.

AGA also argues that the district court clearly erred by finding that the reasonable monthly value of CFS's storage service was $7,400. We agree that the record does not support this amount. The measure of damages for a quasi-contract claim is the reasonable value of the services provided. *See Schimmelpfennig v. Gaedke*, 223 Minn. 542, 548, 27 N.W.2d 416, 421 (1947). The reasonable value of services may be established by proof of the market value of those services. *See Roberge v. Cambridge Coop. Creamery*, 248 Minn. 184, 196−97, 79 N.W.2d 142, 150 (1956) (affirming award that was based on plaintiff's testimony about the value of his services and on testimony of other witnesses engaged in similar business); *see also Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 733−34 (8th Cir. 1995) (affirming, based on Minnesota caselaw, district court's reliance on expert testimony that established market value of benefit). The district court's determination of the reasonable value of services resolves a factual issue and should be upheld unless clearly erroneous. *Ryan v. Bigos Props. by Bigos*, 351 N.W.2d 680, 681 (Minn. App. 1984). Because the factual record does not support the valuation, the valuation reflects clear error.

CFS did not establish the reasonable value of its storage service, and AGA's expert witness provided the only evidence of industry practice. Michelle Lange, director of legal technologies product line management at the computer forensics firm Kroll Ontrack, Inc., testified that once her company begins to assess its clients a storage fee, it charges $3,000 per month to store the quantity of data at issue in this case. By contrast, the only evidence of reasonable value that CFS provided was the May 18, 2006, letter quoting a proposed monthly charge of $7,400, which in context appears to have been intended apparently as a starting point for bargaining rather than a statement of its costs or the amount it would require AGA to pay. Lanterman testified in detail about the process that CFS uses to back up data but provided no basis for the district court to find that the market value of this backup process is $7,400 per month.

We conclude that the district court clearly erred by relying on the May 18 letter to find that the reasonable value of CFS's storage service was $7,400. The only other record evidence of the reasonable cost of storing the amount of data at issue here was Michelle Lange's testimony. We recognize that the $3,000-per-month price quoted by Lange was for copying and storing data in a secure location and Lanterman testified that CFS followed an ongoing backup process. But with no further detail in the record to justify the $7,400 price and given that CFS had presented the $7,400 price as merely an offer, we are certain that the value of services and CFS's original expectation were less than that amount. And the closest any evidence comes to declaring an actual market cost for data storage is the Lange testimony. We therefore remand for the district court to recalculate the award without a new hearing on the valuation issue. The district court

shall recalculate its award using $3,000 as the reasonable monthly value of storage for AGA's data.

II

AGA next challenges the district court's $38,270 award to CFS for analyzing the AGA data for the Liebesny−Peterson prosecution. AGA argues that the award was improper because when CFS first requested compensation for its services in that prosecution, AGA agreed to pay only $4,600 and CFS did not submit an invoice for the balance for almost two years. AGA points to a federal magistrate judge's recommendation in the Afremov fee dispute, in which the judge denied payment of one of CFS's invoices because, in part, the invoice was dated nearly a year after CFS performed the billed services, a fact which suggested that CFS did not initially intend to charge for the work. *See also Stemmer v. Estate of Sarazin*, 362 N.W.2d 406, 408 (Minn. App. 1985) (holding that claimants could not recover in quantum meruit from a decedent's estate when they testified that they had no intent to charge for their services and did not discuss payment with the decedent's guardian before decedent died).

To the extent AGA is arguing that the circumstances had to give rise to an implied promise to pay CFS, we have already rejected that unjust enrichment requires an implied promise. AGA's argument based on CFS's waiting too long to send AGA an invoice also fails because, when CFS first requested payment for its work in the Liebesny−Peterson prosecution in March 2006, it did not limit its request for compensation to the $4,600 that AGA ultimately paid. Unlike the circumstances in *Stemmer*, here Lanterman testified that he expected to be paid for his work in the Liebesny−Peterson case. CFS arguably

accepted AGA's payment as partial payment to allow it to continue trial preparation rather than accepting it as full payment and acquiescing to performing its additional services in the Liebesny−Peterson case at no cost. The district court had a sufficient basis to conclude that AGA's retention of the benefit without paying is unjust. For these reasons, the district court did not abuse its discretion by awarding CFS its entire fee for the Liebesny−Peterson prosecution.

For the reasons stated, the district court's judgment is affirmed in part and reversed in part. We remand for the district court to recalculate CFS's storage-fee award. The district court awarded CFS storage fees for October, November, and December 2005; on remand, the district court shall recalculate the total storage-fee award by excluding storage fees for these three months. The district court awarded CFS storage fees of $7,400 per month; on remand, the district court shall recalculate the award using $3,000 as the monthly fee.

Affirmed in part, reversed in part, and remanded.